United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued By William Sonenshine, Esq.

DOCKET NO. 75-1175

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

RALPH PRINCIPE, PAUL LABRIOLA
and DAWN SLOMKA,

Appellants.

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF IN BEHALF OF APPELLANTS LABRIOLA AND SLOMKA

EVSEROFF & SONENSHINE
Attorneys for Appellants
Labriola and Slomka
186 Joralemon Street
Brooklyn, New York 11201
Tel. No. (212) 855-1111

WILLIAM SONENSHINE, ESQ:
JEFFREY A. RABIN, ESQ:
ROBERT I. WEISWASSER, ESQ:
Of Counsel

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STATEMENT OF THE CASE

Appellants and others were jointly indicted in the United States District Court for the Eastern District of New York under Indictment No. 73 CR 972, charging them with various counts of Conspiracy of Passing Stolen U. S. Savings Bonds by forging the endorsements of the true owners in order to cash them.

A pre-trial motion was held before Hon. Mark A. Costantino to suppress evidence obtained as the product of various wiretap and bugging orders issued out of the New York State Supreme Court of Kings County (Vetrano, J.). These orders and the conversations intercepted thereunder

were subsequently turned over to the Government and formed the basis of the instant prosecution.

No eavesdropping warrants were obtained by Federal agents.

The suppression hearings commenced January 28, 1975 and concluded February 10, 1975 with the decision of Judge Costantino on that day.* (374-378; A39 A-43).

That same day a non-jury trial was held before Judge Costantino. Following the trial (in which the Government's evidence was received by stipulation, over objection as being the product of illegal eavesdropping [385; A 44)]), the Court found all three appellants guilty of conspiracy and, additionally, found appellant Labriola also guilty of forgery (393; A 45).

On April 4, 1975, appellant Labriola was sentenced to a five (5) year jail term and a fine of $5,000.00. Execution of sentence was stayed pending appeal.

On April 18, 1975, appellant Slomka was sentenced to a prison term of three (3) years, execution of which was suspended and appellant placed on probation for three (3) years.

All three appellants are at liberty on bail pending this appeal.

STATEMENT OF FACTS

The pertinent facts are set forth under the appropriate Points in this brief and, accordingly, are not reiterated herein.

*Numerical references preceded by the letter "A", refer to Appendix to Appellants' brief.

POINT ONE

THE EAVESDROPPING WARRANT DATED JULY 5, 1972 WAS EXECUTED IN VIOLATION OF DEFENDANT LABRIOLA'S CONSTITUTIONAL AND STATUTORY RIGHTS. THE EVIDENCE THEREBY OBTAINED SHOULD BE SUPPRESSED AS WELL AS THE EVIDENCE OBTAINED UNDER THE FOUR EAVESDROPPING WARRANTS THEREAFTER OBTAINED AS A RESULT THEREOF.

On July 5th, 1972, Mr. Justice Vetrano, sitting in Supreme Court, Kings County, signed a warrant authorizing the District Attorney of New York County to intercept telephone conversations over a semi-public telephone, number 377-9840, at S.L.A. licensed bar in Brooklyn known as the 1-2-3-4 Club. (29;A 1 ; Government's Exhibit 4).

The warrant was predicated upon allegations by Assistant District Attorney, Leonard Newman that one Joseph Martino, acting under the code name "Paul", was using that telephone to converse with an alleged informant named Stanley Reinhardt for illicit dealing in the alleged Unlawful Possession and Sale of certain U.S. Postal Bearer Bonds and unspecified Industrial Bonds.

The warrant authorized the interception of Martino's conversations over said telephone and "his co-conspirators, agents and associates", in connection with the aforementioned crimes.

Although the warrant was effective for 30 days commencing July 5th, it was not implemented until July 11th, because the subject telephone was out of order until July 11th (98; A 5).

Prior to implementing the order, the police officers who were to overhear and record the telephonic communications were instructed to listen to previously obtained recordings of conversations between Reinhardt and Martino in order to become familiar with the voice of Martino (104; A 6).

Additionally, Seargent Bicina, who was supervising the interceptions, was told by Assistant District Attorney Newman to instruct his men not to record privileged or social conversations, but to record (32):

> "all conversations with respect to Joseph Martino, a person known to us at that time as "Ralph" and that anyone who responded to the name of "Paul" when that number is called, and discussed the theft of negotiation or disposition of stolen securities, or anyone calling that number and engaging in conversations with the inside parties about the theft or disposition as to the disposition or negotiation of stolen securities."

Newman further testified as to instructions given him by dealing with conversations by persons named Paul. He stated (45-46):

> "Q. Now, did you give them any instructions as to what they were to do if somebody called Paul and answered the phone and they realized that is your people overhearing the conversation realized that the Paul who answered the phone was not Joe Martino?
>
> "A If that person who responded to the name Paul when called, if he was engaged in a conversation concerning stolen securities in any respect whatsoever, that call was to be recorded."

The police also undertook a surveillance of the 1234 Club. They learned, by July 6th (prior to commencing telephonic intereception) that Paul Labriola frequented the Club and had a police record involving stolen checks. (122; A 7).

On July 11th, the telephonic intereception began. Among the calls intercepted that day were three to a party named "Paul" (267; A 11). The voice of "Paul" was the same in all three calls (267; A 11). Detective Huller did not know who either party was (273-276; A 14 A 17).

Although the tapes of telephonic conversations between Reinhardt and Martino were readily available to the officers overhearing the 1234 Club telephone, they never listened to it after the tap was installed to compare the voice of Martino with the voice of "Paul" on the 1234 tap to ascertain whether "Paul" was the Martino named in the July 5th warrant or some other "Paul" who was not named in the order (270; A 12).

Detective Huller, after listening to the entire first conversation between the unknown "Paul" and the unknown other party, said he didn't know whether the conversation pertained to his investigation. (272-273; A 13 A 14).

Huller also listened to the entire second conversation on July 9th, although he did not know who "Paul" or the other party was (273; A 14). He stated that there was no reference to industrial bonds or postal bonds which were the subject of the eavesdropping warrant. He attempted to justify his listening to the conversation by saying

that he felt reference to the "piece" as "I.D's" would have had a bearing on the case (273-274; A 14 A 15).

The third conversation was also recorded without knowing who the parties were. Huller described the conversations as "cryptic" because there was reference to "I had to get somebody out" and "Did he pick up the things he was supposed to pick up?" As Huller put it "That could have a bearing. I don't know what, but possibly it could."(275-276; A 16 · A 17).

Huller testified that Detective Boyle, after hearing "Paul" arrange over the tapped phone to meet someone, followed "Paul" to the appointed place (276-277; A 17 A 18).

On July 12th, two more conversations of the same "Paul" were intercepted in toto between "Paul" and one "Ted" (280; A 20).

The entire first conversation simply related to one of the parties arranging to meet the other at "Nick's" in 15 minutes (282:A 21).

The second conversation of July 12th was an unknown male calling into "Paul." The unknown male said "They paid them" and I need a couple of bucks", Paul arranged to meet the unknown male at a candy store (285; A 22).

Huller, although stating that he wanted to know who "Paul" was and whether the voice was Martino's, acknowledged that he would have listened to the entire conversation even if it turned out not to be Martino. (Huller still did not bother to listen to the Reinhardt tapes containing Martino's voice to compare it with the voice he was intercepting at the 1234 Club (285; A 22).

Huller then left the plant immediately after hearing "Paul" arrange to meet the unknown male at a candy store on Coney Island Avenue. He followed the man who left the 1234 Club to the place referred to in the tapped conversation. The man was Paul Labriola (287-289; A 23 A 25).

Huller later informed Seargent Bicina that the "Paul" they were tapping was probably Paul Labriola and not Joseph Martino (290; A 26).

On July 14th, he intercepted a conversation between Paul Labriola and a person he believed was Joseph Martino at the 1234 Club. He, now admittedly knew that the "Paul" he had been recording on the wire tap was not in fact the Joe Martino referred to in the July 5th warrant (293-294; A 27 A 28).

Thus by certainly no later than the 4th day of the intercepting calls, and perhaps as early as the 2nd day of interception, the police knew they were tapping the conversation of a party not named or authorized to be tapped in the July 5th warrant, to wit, the conversations of Paul Labriola.

At this point the police were under a constitutional as well as a statutory mandate to discontinue tapping Labriola's conversations until they obtained a warrant to intercept Labriola's conversations.

The police, however continued to intercept Labriola's conversations between July 14th and July 27th without obtaining a warrant authorizing such tapping (294-296; A 28 A 30).

More specifically, between July 14th and July 27th, Detective Huller and his fellow officers intercepted and recorded twenty (20) completed phone conversations to which Labriola was a party. None of the other parties to whom Labriola spoke were known to the police. (296-297; A 30 A 31).

Seargent Bicina testified that by July 13th, or in any event not later than July 14th, he informed Assistant District Attorney Charles Clayman (who was supervising the investigation) that based on a series of tapped conversations he now felt that "it was Paul Labriola and not the Joe Martino known as Paul" whose conversations they had been intercepting and "we felt that there should be an amendment" Clayman replied that it would be done when the order was due for renewal. (190-191; A 8 A 9).

Thus on July 14th the District Attorney (after only four days of intercepting conversations) delayed seeking a modification of the warrant until July 27th - a thirteen day period in which they continued without abatement or minimization to unlawfully intercept Labriola's conversations. In fact on July 14th, Assistant District Attorney, Clayman specifically instructed Bicina to nonetheless continued to intercept Labriola's conversations (191-192; A 9 A 10).

Two of those post July 14th conversations were submitted in support of the amended order signed by Judge Vetrano on July 27th (see Point two, supra).

The issue here presented is whether the police had a constitutional right to continue, without applying for an amended order, to intercept Labriola's telephone conversations up to July 27th where they knew by July 12th or at the latest July 14th, that Paul Labriola was not in fact Joseph Martino (a/k/a Paul), that was named by Mr. Justice Vetrano in his July 5th warrant.

Certain preliminary observations are in order in considering this issue:

(a) The July 5th warrant was predicated exclusively upon information relating to the theft of specifically described Postal Bearer Bonds and an undetermined quantity of "industrial" bonds. No other type of stolen property is described in the affidavit or the warrant (46-48; A 2, A 4).

Thus the conversations to be intercepted must be deemed limited to authorizing only "a particular description of the type of communications sought to be intercepted" (Criminal Procedure Law §700.30). To allow the scope of the warrant to go beyond such limitations would result in a constitutionally prohibited general warrant (U.S. Const., Amendments 4 and 14; N.Y. Constitution Article 1, §6 and 12; Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41).

(b) The two July 21st conversations recorded and submitted to Mr. Justice Vetrano on July 27th in support of the amended order to include Labriola as a party whose conversations might be intercepted

were clearly conversations outside the scope of the July 5th warrant.

By Mr. Clayman's own affidavit of July 27th those conversations could have related to stolen checks or any other kind of stolen security (affidavit, p. 4). Indeed Mr. Clayman's affidavit of July 27th (p. 5) interprets the conversation of July 21st to refer to some new future theft of an unspecified quantity of undescribed securities -- certainly not under any interpretation the previously stolen Postal Bonds or industrial securities.

Thus the intercepted conversations related to crimes not specifically referred to in the July 5th order. As such, an amended order should have been obtained "as soon as practicable" after July 12th or certainly after July 14th. Yet the District Attorney when apprised of this by Seargent Bicina in July 13th or July 14th, deliberately and consciously determined not to seek an amendment until July 27th and specifically directed that the wiretapping of Labriola's conversations nonetheless continue unabated.

This type of situation was considered by the Appellate Division, First Judicial Department in People v. DiStefano, 45 A.D. 2d 56, 356 N.Y.S. 2d 316, appeal to N.Y. Ct. of Appeals pending).

In DiStefano, a wiretap order not naming the defendant was issued. On April 6th, police intercepted a conversation between defendant and another person not named in the warrant in which a prospective robbery was discussed. This crime was not within the scope of the warrant.

On April 17th, further conversations dealing with the

robbery were overheard between defendant and others not named in the order. As a result of those conversations, the police undertook surveillance of the defendant and ultimately charged him with Conspiracy and Attempted Robbery.

On May 5th the District Attorney obtained an order amending and renewing the earlier warrant. The supporting affidavit referred only to the April 17th conversations.

The Appellate Division suppressed the evidence and dismissed the indictment. Mr. Justice Tilzer wrote at 356 N. Y. S. 2d 320-322:

> "Considering first the contents of the communications intercepted on April 17, 1972 and the evidence derived therefrom, we do not believe that such evidence was properly admissible or within the scope of CPL 700.65 (4). As previously indicated the provision permitting an amendment to include matter not originally sought was intended to make admissible evidence which was lawfully obtained in the course of executing the warrant but which resulted from unanticipated or unexpectedly overheard conversations, unrelated to the eavesdropping warrant. The police officers and Assistant District Attorney herein, were, since April 6, 1972, alerted to the plans for the robbery and thereafter when they continued to intercept communications eleven days later, which were not within the scope of the eavesdropping warrant, did so for the specific purpose of obtaining further evidence of the new crime. Accordingly, it cannot be said that the April 17th conversations were unexpectedly overheard. (See United States v. Cox, 10 Cir., 449 F 2d 679, 687.)

To allow testimony as to the contents of such communications (and with respect to evidence derived therefrom) when the evidence was intentionally obtained, without prior court scrutiny, would permit the District Attorney, in his own discretion to expand the entire scope of the eavesdropping warrant, and to thereafter elgitimize such action by a subsequently obtained court order. The statute was not so intended and if it is interpreted in that manner there would be grave doubt as to its constitutionality. (See Katz v. United States, 339 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576; Berger v. New York 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed. 2d 1040).

The nature and purpose of the provision permitting amendments to include unanticipated conversations was considered in People v. Ruffino, 62 Misc.2d 653, 309 N.Y.S.2d 805. In that case it was held that a delay of over three months in seeking amendment did not render inadmissible evidence which otherwise was legally intercepted. It was concluded that since only one conversation was intercepted and thereafter the wiretap was immediately discontinued defendant's rights were not affected by the failure to comply with a statutory condition subsequent. However, the Court (Shapiro, J.), stated:

> 'It seems apparent that the purpose the lawmakers had in mind, in requiring an amendment of an outstanding intereception order where new criminal matters not specified in the warrant came to light over the wiretap, was to legalize the continuance of the wiretap to discover further evidence of the newly disclosed crimes... The failure to obey the statutory requirement that an amended order be obtained should bring into play an exclusionary rule only where the interception, contiues after an unprovided-for conversation is overheard, for it is only the contin-

uation of the wiretap which makes judicial supervision necessary for the protection of Fourth Amendment rights of privacy." (People v. Ruffino, supra, 62 Misc. 2d pp. 660-661, 309 N.Y.S. 2d p. 812.)"

Further, the application for amendment must be made "as soon as practicable". That provision is not complied with where there is considerable delay after acquisition of knowledge of the new crimes, and where prior to making the application, the People, nevertheless, continue interception of matters not within the scope of their court authorization.

Accordingly, we conclude that the conversations intercepted on April 17th and the evidence obtained as a result were inadmissible and that the motion to suppress such evidence should have been granted.

A somewhat different problem is presented with respect to the April 6th conversation. That conversation was intercepted without prior knowledge of defendant's activities and accordingly, may be considered to have been unexpectedly overheard and within the scope of CPL 700.65(4). If a motion to amend the order had been made to include such conversation we would be confronted with a similar issue as presented in People v. Ruffino, supra, i.e., whether the failure to amend as soon as practicable renders inadmissible evidence otherwise legally obtained. Of course, the issue herein, is further complicated since unlike the situation in Ruffino, the People continued to wiretap in search of further evidence, and accordingly, the failure to make a timely application herein, even relating soley to April 6th, could be considered more than a technical defect. We need not, however, pass upon this question for several reasons. First, the affidavit in support of the application to amend was limited solely to the conversations and events relating to April 17th. While the daily plant reports were submitted, such does not mean

> that the order extended to each and every conversation set forth in those reports. Such would be entirely too broad, and was neither permissible nor intended. Accordingly, the conversation of April 6th should have been suppressed."

Accordingly, we respectfully urge that the conversations of Paul Labriola intercepted under the July 5th order and all those which followed be suppressed as well as any evidence derived therefrom.

POINT TWO

THE EAVESDROPPING WARRANT OF JULY 27, 1972 ISSUED BY MR. JUSTICE VETRANO, WAS NOT SUPPORTED BY PROBABLE CAUSE AS TO PAUL LABRIOLA

Mr. Justice Vetrano had originally issued a warrant for eavesdropping, dated July 5, 1972. That order did not name Paul Labriola. During the course of the eavesdropping under that warrant, the police intercepted various calls alleged to be those of Paul Labriola. Predicated upon those interceptions (see Point One, supra), the District Attorney of New York County applied for a further warrant, renewing and amending the July 5th warrant, so as to include Paul Labriola. On July 27, 1972, Mr. Justice Vetrano granted that order, which now included authority to install a bug into the 1234 Club, as well as to continue previously authorized wiretapping (see, opinion of Judge Costantino (377-378; A 42 -A 43) and Mr. Justice Vetrano's order of July 27 with supporting affidavit (A46-61).

It is, of course, axiomatic that an order for eavesdropping must be predicated upon probable cause. Additionally, the probable cause must appear within the four corners of the supporting affidavits when, as in the present case, the court took no further testimony or evidence prior to issuing the order.

Turning then to the July 27th order, we note the following with respect to its applicability to Paul Labriola. (Government's Exhibit 4 [A46-61])

The factual affidavit supporting the order was that of Assistant District Attorney Charles Clayman. After reciting the prior order of July

5th, he went on to indicate that two conversations of a person described as "Paulie" were intercepted pursuant to the prior warrant. The first of these conversations referred to in paragraph 2(b) at pages 3 and 4 of Mr. Clayman's affidavit was as follows:

"At 2:55 p.m. on July 21, 1972, Paulie (co-conspirator of Joe Martino, see paragraphs 23 and 24 of July 3, 1972 affidavit) made the following outgoing call.

Paulie (In)	I'll meet you 9 o'clock at Coney Island "L&M"
Leon (Out)	Heh Heh
In	The luncheonette
Out	Yeah yeah what's new otherwise
In	Oh nothing
Out	Did you get what you were suppose to get?
In	We're getting them. He's got them, and we're getting tonight, so eh remember that thing that you needed that little stamp, do you still have it?
Out	Eh come again
In	Do you know the thing you needed the last time the stamp
Out	I needed
In	Yeah remember the last batch a long time ago
Out	Oh yeah yes yes yes yes yes
In	Do you still have that stamp?

"Out	Eh' yes I have it right here
In	Oh good because that's what we need
Out	That one with the eh
In	Yeah
Out	Wait wait a minute, wait a minute, I have the one with the date.
In	That's the one we need
Out	What about the other one
In	That one we needed the last time, we need again because they've the same thing"

To begin with we note that there is no allegation that the "Paulie" referred to is claimed to be Paul Labriola. Moreover, the conversation is between "Paulie" and a person named Leon. It must be born in mind that the original warrant authorized only the interception of calls involving Joe Martino and his co-conspirator, and that must be limited, for constitutional purposes, to the specific crimes being investigated, namely, allegedly stolen postal bearer bonds and industrial bonds.

Thus, it is immediately apparent that the parties named in the original order are not the parties to this conversation. Moreover, the conversation cannot be regarded as one having anything to do with United States postal bonds or industrial bonds.

The conversation, at most, is highly equivocal from which no inference of criminal conduct can or should be constitutionally permissible. The porported interpretation that stamps are used in connection with stolen bonds can give rise, at most, to a suspicion of

improper conduct, but even that is nothing more than a surmise. To hold otherwise, would be to hold that a conversation in ordinary English language, on its face innocuous could become a basis for probable cause merely on the subjective opinion of a Police Officer seeking to convert a guess into a factual basis at the level of probable cause. In any event, it must not be overlooked that the conversation in no way can give rise to an inference that the subject matter under discussion is postal bonds or industrial bonds as opposed to any other bonds if indeed it can be interpreted by any stretch of the forensic imagination to relate to bonds at all.

Even assuming thatthe quoted conversation could relate to criminal conduct involving stolen bonds other than postal bonds or industrial bonds, it would necessarily have to be treated as evidence of a new crime, not the subject matter of the original warrant and, consequently must be suppressed because the District Attorney did not obtain the ammended order "as soon as practicable". (Criminal Procedure Law, Section 700.65: Point One, supra).

The second quoted conversation, occurring later the same day and found in paragraph 2(c), page 5 of Mr. Clayman's affidavit sheds no further light on the issue of probable cause. That conversation, in its entirety is as follows:

> "At 10:25 p.m. on July 21, 1972, Paulie received the following call:
>
> Joe — When you send the other thing put in an envelope but put tissue around it

Paul	I got the blank but I don't know if the other guy is around to type it up
Joe	Send it airmail special delivery. Send it to 160-20 Sepulveda Blvd. That's my name your using Joe Antonakes. I ran into something out here, I think I got something real big in the broke. It's worth about 200 big ones. I'll see you next week. Who do you have to wait for? Leon.
Paulie	Yeah he has to do the typing I met Leon tonight."

The arguments previously urged as to the first conversation are again applicable here.

Once again, the District Attorney sought to raise a conversation essentially innocuous on its face when taken literally, to the constitutional level of probable cause by interpreting the words "something real big in broke" as a criminal conversation allegedly dealing with stolen securities in brokerage houses and their shipment through the mail in the future. Objectively viewed, as it must be, the proposed interpretation is in reality, to paraphrase an old saying, a case of evil being in the eye of the beholder. Constitutional standards have always required an objective interpretation rather than a subjective one. From the point of view of objective interpretation, one can offer any number of interpretations of that conversation, ranging from the sublime to the ridiculous and come no closer to probale cause than the merest of surmise and conjecture.

The order on its face, patently lacks a factual basis for probable cause to believe that Paul Labriola was a conspirator of Joseph Martino

in connection with the claimed theft and possession of stolen postal bonds or stolen industrial bonds (Criminal Procedure Law, Sections 700.15, 700.20 and 700.25; Title 18 U.S. Code, Section 2518; U.S. Constitution Articles 4 and 14; New York State Constitution Article 1, Pargraph 6 and Paragraph 12).

It is therefore respectfully urged that the warrant of July 27, was not properly issued. Such warrant along with the succeeding warrants authorizing eavesdropping as to Paul Labriola should be held to be invalid and the evidence obtained thereunder or derived therefrom should therefore be suppressed in their entirety.

POINT THREE

THE EXECUTION OF THE WARRANT OF JULY 27, WAS CONSTITUTIONALLY IMPERMISSIBLE, IN THAT THERE WAS A CONCEDED FAILURE TO COMPLY WITH AND MINIMIZE THE EXTENT OF THE BUGGING DIRECTED UNDER SAID WARRANT

The warrant issued by Mr. Justice Vetrano on July 27, 1972, in addition to the statutorily required minimization clause contained the specific direction that the bugging authorized to take place at the 1234 club be limited in that "such interception not occur after 7:30 p.m. on any day."

It appears from the testimony and from the exhibits consisting of the police logs of the bugged conversation pursuant to the July 27th warrant, that notwithstanding the cut-off hour of 7:30 p.m. that virtually each day, through and including August 30th the bugging continued inexorably and without any attempt whatever to comply with the order by terminating the bugging at 7:30 p.m. The evidence clearly reveals that the bugging, which was usually set into motion at approximately noon or earlier, recorded conversations from that time until well past midnight and the conversations taking place were unceasingly intercepted and recorded, in direct violation of Mr. Justice Vetrano's order of July 27th. The United States Attorney concedes that there was indeed a failure to minimize, pursuant to the directions contained in Mr. Justice Vetrano's order of July 27th (329-333; A 34 - A 38). The Court below so found by its opinion at the conclusion of the hearings (377-378: A 42 - A 43).

In this connection, it should be noted that based upon a bugged conversation occurring on August 11, 1972 allegedly between Joe Martino and Paul Labriola at the 1234 club and allegedly pertaining to the acquisition and cashing of counterfeit securities (see paragraph 1 page 10 of Mr. Clayman's affidavit of September 11, 1972), the District Attorney of New York County obtained an order authorizing the continuance of the bugging of oral conversations at the 1234 club.

During the period of the bugging under the July 27th order, a "bugged" conversation was recorded on August 15th among appellant Slomka, "Paul" and one "Willie" in which they discussed a "package" and "I.D.", presumably referring to identification documents. This conversation was "bugged" at approximately 10:00 p.m. - 2-1/2 hours after the 7:30 p.m. cut-off hour specified in the July 27th order.

The instant case is distinguishable from the majority of cases that deal with the question of minimization. In the case at bar while minimization may be an issue concerning those conversations intercepted up to 7:30 p.m. as authorized by the court order we are now confronted with the question of appropriate sanctions to deter the recording of conversations after the authorized interception time.

In the usual minimization situation nonpertinent conversations are not to be recorded in an effort to protect the constitutional rights of the individual. Courts when confronted with a violation of this mandate such as when all conversations are recorded must determine whether or not to suppress all conversations intercepted or just those taken in violation

of the minimization requirement. While it has been recognized that in certain situations it is difficult if not impossible to properly minimize, it has also been recognized that blatant violations of the court's order must be severly dealt with.

The order in the instant case specifically directed the intercepting officers to terminate their activities at 7:30 p.m., the officers ignored said directive and continued recording thereafter.

In People v. Holder, 331 N.Y.S. 2d 557, 69 Misc. 2d 863, the court referring to a failure to follow minimization during a court ordered wiretap stated at page 570:

> "The intercept was never cut off and the surveilling agent did not even attempt 'lip service' compliance with the statutory mandate, but rather completely disregarded it.....
> from the record before this Court, it appears that the police intended to glean every conceivable shred of relevant conversation from every telephone call and thus they turned the eavesdropping warrant into a general search warrant and totally disregarded the direction in the warrant.....
> Such a practice cannot be countenanced by this Court."

The Court suppressed all the conversations intercepted in the Holder case (supra) stating that "only by imposing such a severe penalty will compliance in the future be guaranteed".

While it is recognized that the Federal Courts are in disagreement as to whether or not to suppress all conversations with United

States v. King, 335 F. Supp 523; United States v. Cox, 462 F. 2d 1293; United States v. LaGorga, 336 F. Supp. 190; and United States v. Mainello, 345 F. Supp. 863 holding for partial suppression and United States v. Scott, 331 F. Supp. 233; United States v. Focarile, 340 F. Supp. 1033 holding for total suppression the New York Courts agree that total suppression is the more appropriate remedy when there is a blatant violation (see People v. Holder, supra, People v. Castania, 340 N.Y.S. 2d 829).

The method employed in the instant case was considered in U.S. v. Focarile, supra, when such violations were catagorized. The court in considering this tupe of violation stated at page 1046:

> "The first type of violation would be the one committed if there had been no attempt at all to minimize the interception of 'innocent' calls. This first type of violation would obviously be a blatant violation of Title III and, in addition, would probably violate the precept of the Fourth Amendment."

If this Court sanctions the actions of the prosecution in a case such as this it will be permitting court approved violations of an individual's Fourth Amendment Rights.

> "Knowing, that only 'innocent' calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III." (U.S. v. Focarile, supra)

The United States Supreme Court in Berger v. New York, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 condemned the very procedures followed in the present case in holding the former New York statute unconstitutional because of its lack of particularity and control.

The Court in Berger v. New York, supra, recognized that it was virtually impossible to have an eavesdropping statute that was not violative of certain constitutional protections therefore leading us to urge herein that the New York statute must be held to be unconstitutional. With these possibilities in mind new statutes were drafted in New York with certain safeguards in an attempt to limit these constitutional infringments. Permitting a disregard for these safeguards brings us right back to the situation presented to the Supreme Court in Berger v. New York, supra, and Katz v. United States, 398 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576.

The violation of the Court order in the present case is distinguishable from all the previously mentioned cases which authorized only partial suppression because of the continued recording after a specific definite termination time. The remedy is clear, as the Court stated in United States v. King, 335 F. Supp. 523 at page 545:

> "That this Court has declined to suppress the entire wire interception should in no way be taken as judicial approval of the Government's tactics. By failing to minimize surveillance in accordance with the statute and the authorizing order, the Government has placed upon this Court the burden of effecting minimization, a situation hardly envisioned by the statute, and one which this Court does

"not willingly accept. The Government would do well to remember that the limited system which the statute creates is designed to prevent unreasonable invasions of privacy, not to repair them and that if those limitations are not voluntarily adhered to by the Government, total suppression may well prove to be the only feasible solution." (emphasis added)

Further, while there are a disparity of decisions among the Federal District Courts concerning these issues, it must not be forgotten that New York State while abiding by Federal law may construe statutes as well as constitutional amendments more strictly than the federal courts imposing a greater duty upon the enforcers of its laws. This concept is apparent considering the previously cited state cases versus the federal decisions. There can be but one remedy in a situation such as this; that is, total suppression of each and every conversation intercepted as well as those developed following these improperly seized conversations.

POINT FOUR

THE FAILURE OF THE DISTRICT ATTORNEY TO SERVE THE STATUTORY 90 DAY NOTICE UPON THE APPELLANT'S FOLLOWING THE TERMINATION OF THE EAVESDROPPING IN THE 1234 CLUB REQUIRES THAT THE EVIDENCE OBTAINED UNDER THE JULY 27TH ORDER AND THOSE WHICH FOLLOWED BE SUPPRESSED

This phase of the case deals with Section 700.50 Subd. 3 of the Criminal Procedure Law which provides that "in no case later than 90 days after the termination of an eavesdropping warrant or expiration of an extension order", written notice must be personally given to each person named in the warrant.

The pertinent facts deal in this matter are the following:

1. On July 5th 1972 Mr. Justice Vetrano issued the first of a series of 5 eavesdropping warrants. That first order did not name the defendant.

2. On July 27th, Mr. Justice Vetrano amended and extended the July 5th order so as to include the defendant, Paul Labriola.

3. Three subsequent orders were thereafter issued each in turn dependent upon the prior order.

Det. Huller testified at the hearing that in executing the July 27th order for eavesdropping at the 1234 Club the eavesdropping plant was shut down and no further eavesdropping was undertaken after September 1st. The reason for the termination was because

the police knew that the 1234 Club was closed and nobody was there (299-300; A 32 - A33).

It is our contention herein that since the eavesdropping was deliberately terminated by September 1st the Appellant Labriola thereafter within 90 days from September 1st entitled to the statutory notice pursuant to Criminal Procedure Law Section 700.50. Mathematically computed the 90 day period following September 1st would terminate on November 29th.

The minutes of the Supreme Court proceedings wherein the notices were served upon Labriola indicate that such service, (as found by Judge Costantino in his opinion below), occurred on December 13th, 1972, long after the expiration of the 90 day period.

As to appellant Slomka, more than one (1) year elapsed before she received the "90 day" notice (377-378;A 42 -A43).

People v. Huston, 34 N.Y. 2d 116, 356 N.Y. Sub. 2d 272. New York Court of Appeals dealt with the question of giving the statutory notice. Judge Rabin writing for a unamimous court said at 34 N.Y. 2d 121:

> "The People admit that they did not give the written posttermination notice required by the statute. While we may assume that the lack of such notice might ordinarily require suppression of the evidence obtained as a result of the warrant (see People v. Tartt, 71 Misc. 2d 955, 336 N.Y.S. 2d 919, supra), we believe that the special circumstances present in this case compel a different conclusion."

The Court than detailed the unique circumstances which governed its decision in this case. The case at bar however, presents no such extraordinary situation upon which the government can rely to relieve itself of its default. The underlying juridical philosophy applicable here are in words expressed in U.S. v. Giordano, 469 F. 2d 522, 530:

> "We cannot relegate provision after provision to oblivion by terming each a mere 'technicality' - or else we leave the statute a shadow of itself, an apparition without substance'".

An interesting corollary is found in the case of Olmstead v. U.S., 277 U.S. 438, 485, 48 S. Ct. 564, 575:

> [when] "government becomes a law breaker, it breeds contempt for law".

See also People v. Kennedy, 75 Misc. 2d 10 347 N.Y. Supp. 2d 327.

It is therefore respectfully submitted that the failure to give the 90 day notice was a matter of substantial right designed to prevent the Government from encroaching upon constitutionally guaranteed rights of privacy by giving notice of recent eavesdropping to persons named in an eavesdropping warrant.

It would therefore follow that the evidence obtained under the July 27th order of Mr. Justice Vetrano and those which follow it and which are dependent upon it should have been suppressed as to appellant's Labriola and Slomka.

CONCLUSION

THE EVIDENCE OBTAINED AGAINST THE DEFENDANT LABRIOLA UNDER EACH OF THE 5 EAVESDROPPING ORDERS IN THIS CASE, AND THE EVIDENCE DERIVED THEREFROM SHOULD HAVE BEEN SUPPRESSED UPON THE TRIAL HEREIN.

THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR A NEW TRIAL ORDERED.

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Appellants
LABRIOLA and SLOMKA

WILLIAM SONENSHINE, ESQ.
JEFFREY A. RABIN, ESQ.
ROBERT WEISSWASSER, ESQ.
Of Counsel